Supreme Court, U.S.
FILED
JAN 4 2001
OFFICE OF THE CLERK

(8) (7)

Nos. 00-632 and 00-633

IN THE

Supreme Court of the United States

STATE OF MICHIGAN, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

STATES OF OHIO AND INDIANA,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., KEYSPAN GENERATION LLC, PECO ENERGY COMPANY, AND PSEG POWER LLC

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QUESTION PRESENTED

Whether this Court should grant certiorari to consider the Court of Appeals' correct determination that the Environmental Protection Agency did not abuse its discretion or violate the federalist structure of the Clean Air Act when it considered a cost factor in the determination of significant contribution under Section 110(a)(2)(D) of the Act.

PARTIES TO THE PROCEEDINGS AND RULE 26.1 STATEMENTS

The following is a list of the parties filing this brief in opposition, together with their statements pursuant to S. Ct. R. 26.1. These parties were intervenors below in support of affirmance and are respondents in this Court pursuant to S. Ct. R. 12.6:

Consolidated Edison Company of New York, Inc., states that its parent corporation is Consolidated Edison, Inc., a publicly held corporation. Consolidated Edison Company has no affiliates or subsidiaries that have issued shares or debt securities to the public.

KeySpan Generation LLC states that its parent corporation is MarketSpan Corporation, d/b/a KeySpan Energy, a publicly held company. An affiliate of KeySpan Generation LLC, The Houston Exploration Company, has also issued shares or debt securities to the public.

PECO Energy Company states that its parent company, Exelon Corporation, has issued stock to the public. no other affiliates or subsidiaries of the Company have issued shares or debt securities to the public.

PSEG Power LLC (formerly Public Service Electric & Gas Co.) states that its parent company, Public Service Enterprise Group Incorporated, has issued stock to the public. No other affiliates or subsidiaries of PSEG Power have issued shares or debt securities to the public.

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BRIEF IN OPPOSITION FOR CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., KEYSPAN GENERATION LLC, AND PSEG POWER LLC

Respondents Consolidated Edison Company of New York, Inc., Keyspan Generation LLC, and PSEG Power LLC respectfully request that the Court deny the petitions for certiorari filed in this case by the State of Michigan, *et al.* in No. 00-632 ("Michigan") and by the States of Ohio and Indiana in No. 00-633 ("Ohio and Indiana"). We refer to these petitioners collectively as "Petitioning States."

INTRODUCTION

This case meets none of the criteria warranting an exercise of this Court's certiorari jurisdiction. *See* S. Ct. R. 10. It implicates no conflict among the circuits and raises no important unsettled questions of law. To the contrary, this case involves the ordinary exercise of discretion by the Environmental Protection Agency ("EPA") in implementing a statutory provision of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q (1994 & Supp. III 1997), requiring states to address the interstate transport of air pollution. The rule at issue, 63 Fed. Reg. 57,356-537 (Oct. 27, 1998), which is referred to as the "NOx SIP Call," requires certain states to revise their State Implementation Plans ("SIPs") to reduce emissions of nitrogen oxides (NOx) that impact ozone attainment problems in downwind areas.

In an attempt to transform this typical administrative rulemaking case into one worthy of this Court's review, Petitioning States argue that the Court of Appeals decision in this case conflicts with holdings of the D.C. Circuit in other CAA cases, including *American Trucking Ass'ns* v. *EPA*, 175 F.3d 1027 ("*ATA*"), *modified on reh'g*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003, 2193 (2000). Petitioning States' attempt to manufacture certworthy issues from superficial similarities in these cases is misguided. Far from implicating important jurisprudential conflicts, this case involves an unremarkable affirmation of agency discretion consistent with well-settled law.

Petitioning States also argue that this case raises important federalism and interstate equity issues relating to the interstate transport of air pollution that require this Court's review. While the CAA provision at issue certainly does implicate issues of federalism and interstate equity, the D.C. Circuit correctly determined that EPA's rulemaking was properly responsive to these concerns. Petitioning States do

not provide any compelling arguments for devoting this Court's scarce resources to further review of these matters.

Respondents filing this opposition provide the Court with an important perspective on the rule at issue in this case: that of electric generating companies in downwind states who view the NOx SIP Call as a soundly reasoned, technologically and economically feasible, *necessary* step to address the complex and persistent problem of interstate transport of ozone.

Over the last decade electric generators in downwind states have invested many millions of dollars in control technologies to improve air quality and assist in their states' efforts to attain the national ozone standard. The beneficial health impacts of these emission control efforts, however, have been largely thwarted by imported NOx from upwind sources in the South and Midwest that are not subject to as strict emission control requirements and can produce electricity using higher-emitting, cheaper fuel sources. Their transported emissions intermingle with other airborne emissions and significantly increase downwind states' ozone levels. By requiring upwind states to control their sources not only to prevent local air pollution but to prevent—as the CAA requires—significant contribution to ozone attainment problems downwind, the NOx SIP Call will remedy this gross inequity and its resulting adverse health impacts.

COUNTERSTATEMENT

As Petitioning States explain, Michigan at 4-5, Ohio and Indiana at 3-4, Section 110(a)(2)(D) of the CAA, 42 U.S.C. § 7410(a)(2)(D), requires states to prevent air pollution sources located within their boundaries from significantly contributing to air quality attainment problems in downwind states. Pursuant to its expressly delegated authority to implement that provision, EPA promulgated the NOx SIP

Call, requiring certain states in the eastern half of the United States to revise their state air quality plans to eliminate amounts of NOx emissions that EPA had determined were "significantly contributing" to downwind ozone attainment problems.

While Petitioning States characterize EPA's calculation of "significant contribution" in the NOx SIP Call as one based solely on cost considerations, *see* Michigan at 6-7, Ohio and Indiana at 4, EPA's determination of significant contribution was in fact a two-step process based primarily on air quality factors and only secondarily on cost considerations.

In the first step, the agency identified states that were "significantly contributing" to downwind attainment problems, using air quality modeling that determined whether the NOx emissions of a state, when combined with emissions from other states, were a significant factor in the formation of ozone in downwind states. *See* 63 Fed. Reg. at 57,381. Only after having thus identified, on the basis of air quality factors alone, the states that were significantly contributing to ozone attainment problems downwind did EPA use a cost-based methodology to calculate the amounts of NOx emissions that these states could permissibly emit without violating the Section 110 prohibition on significant contribution. *Id.*

Because air quality modeling is not well-adapted to quantify precise emissions impacts,[1] in this second step EPA identified a set of cost-effective control technologies and then, using state-specific NOx inventory information, modeled the air quality impacts of applying these technologies to the covered states. Finding that the resulting levels of NOx emissions would significantly reduce ozone formation in

[1] Air quality models, particularly broad regional scale models such as those used in the NOx SIP Call, are excellent tools for identifying directional trends and relative impacts, but are not regarded as well-suited for determining precise quantities of emissions impacts.

downwind states, EPA established those levels as state-specific "NOx budgets"—for each state, the total amount of NOx emissions that could be emitted consistent with Section 110's prohibition on significant contribution to transport. Specifically, EPA's NOx emission budgets were based on the NOx emissions levels that would be permitted in these states under uniform application to their NOx inventories of certain NOx pollution controls that EPA had determined could be cost-effectively implemented at $2,000 per ton or less. *See* 63 Fed. Reg. at 57,365.

The Court of Appeals upheld EPA's consideration of this cost factor in its determination of significant contribution under Section 110(a)(2)(D). It also rejected challengers' arguments that the CAA requires state-specific quantifications of significant contribution and that the SIP Call Rule impermissibly denied states their rights under the CAA to determine their implementation strategies.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER DECISIONS OF THE D.C. CIRCUIT

In an attempt to manufacture a case for certiorari where none exists, Petitioning States argue that the decision below conflicts with holdings of this Court and with prior decisions of the D.C. Circuit regarding EPA's discretion to consider costs in implementing the CAA. *See* Michigan at 7-8, 20-21; Ohio and Indiana at 14-15. Specifically, Petitioning States point to two of this Court's cases, *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976), and *Train* v. *NRDC*, 421 U.S. 60 (1976), addressing EPA's authority to consider economic factors when evaluating the adequacy of a state's SIP submittals under CAA Section 110, 42 U.S. § 7410, and to two D.C. Circuit decisions, *Lead Indus. Ass'n* v. *EPA*, 647 F.2d

1130 (D.C. Cir.), *cert. denied,* 449 U.S. 1042 (1980), and *ATA,* 175 F.3d 1027, holding that EPA lacks authority to consider costs when setting National Ambient Air Quality Standards ("NAAQS") under CAA Section 109, 42 U.S.C. § 7409.

A. The Decision Below Does Not Conflict With Decisions Of This Court Addressing EPA's Authority To Consider Cost Factors Under CAA Section 110.

The decision below does not conflict with the Section 110 precedents of this Court cited by Petitioning States. In both *Union Electric,* 427 U.S. at 257 & n.5, and *Train,* 421 U.S. at 90-91, the Court addressed arguments about EPA's authority under provisions of Section 110 other than Section 110(a)(2)(D) to consider claims of economic and technological *infeasibility—i.e.*, to use cost considerations to excuse a state's failure to comply with EPA's interpretation of the requirements of Section 110. These cases are distinguishable first because they involve challenges to agency action arising under, and interpreting, different provisions of Section 110 than the one at issue in this case. More importantly, the underlying principle of these cases—that EPA may not rely on cost factors to allow states to *impede* CAA compliance—does not conflict with the decision below upholding EPA's use of a cost factor in its determination of how states must comply with Section 110(a)(2)(D)'s transport prohibition.

Indeed, in *Union Electric* this Court expressly addressed EPA's authority to consider costs in the context of facilitating rather than hampering compliance with Section 110. As Petitioning States acknowledge, Michigan at 9 n.4, the Court indicated that, in evaluating whether a SIP includes provisions for attaining the NAAQS "as expeditiously as practicable" as required under Section 110(a)(2)(A)(i), EPA "may consider whether it is economically or technologically

possible for the state plan to require more rapid progress than it does." *Id.* (citing *Union Electric*, 427 U.S. at 265, n.13). EPA's use of a cost factor in determining significant contribution in the NOx SIP Call is consistent with the principle that the agency may consider costs in the context of facilitating state compliance with Section 110's air quality goals. [2]

B. The Decision Below Does Not Conflict With D.C. Circuit Decisions Addressing EPA's Authority To Consider Cost Factors Under CAA Section 109.

Contrary to Petitioning States' assertions, the D.C. Circuit's holding in the *ATA* and *Lead Industries* cases—that EPA is prohibited from considering costs when establishing the NAAQS under Section 109—does not conflict with the decision below upholding EPA's authority to consider cost factors in determining significant contribution under Section 110(a)(2)(D). Sections 109 and 110 are different statutory sections with different purposes. Section 109 requires EPA to set NAAQS that, "based on [statutory] criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b). Section 110 is a very lengthy section with many different provisions detailing the many obligations of states with respect to their air quality implementation plans. EPA is charged with responsibility for implementing both sections, of course, but the statutory

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[2] Another circuit has also concluded that cost considerations are permissible in enforcing Section 110's requirements where those considerations are employed to achieve, not impede, compliance with Section 110's air quality goals. *See South Terminal Corp.* v. *EPA*, 504 F.2d 646, 676 (1st Cir. 1974) (observing, with respect to EPA regional transportation control plan imposed as a Federal Implementation Plan under Section 110, that "[e]conomic considerations may play some role * * * in EPA's selection among alternative means to achieve its mandated clean air goal").

standards that EPA must interpret in defining the agency's and the states' obligations under the two sections are entirely unrelated to each other.

Thus, the decision below does not present an issue similar to the one before this Court in *ATA*. Indeed, the Court of Appeals expressly noted that the NOx SIP Call case only concerned whether EPA could permissibly consider cost in its implementation of Section 110(a)(2)(D) and did not raise issues as to whether the agency was required to consider costs or was permitted to use a cost/benefit criterion in selecting its final rule, Michigan App. at 15a-16a, issues that are raised in *ATA*. [3]

Certainly, the judges who authored the opinion below would be surprised to learn that the decision conflicts with prior D.C. Circuit precedent. The opinion provides a lengthy analysis of how the decision is derived from the "settled law of this circuit." Michigan App. at 20a-22a. In particular, the opinion focuses on a prior case upholding EPA's authority to consider costs when regulating hazardous air pollutants under Section 112 of the CAA, 42 U.S.C. § 7412, to achieve an "ample margin of safety" to protect public health, *see* Michigan App. at 20a (citing *NRDC* v. *EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (en banc)). The Court of Appeals observed that *NRDC*, along with several other cases, stands for the principle that unless there is "clear congressional intent to

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[3] Indeed, the lack of conflict between the D.C. Circuit's holdings is evidenced by the fact that the decision below issued only ten months after the *ATA* decision, with parts of both decisions authored by the same judge; clearly, Circuit Judge Williams did not perceive any conflict between the two cases. Further, petitions for rehearing were rejected by the D.C. Circuit. *See* Michigan App. at 55a-58a.

preclude consideration of cost," an agency is not barred from considering it. *Id.*

Applying the *NRDC* standard, the D.C. Circuit concluded that EPA's consideration of cost factors in the significant contribution determination was permissible, stating that "there is nothing in the text, structure or history of § 110(a)(2)(D) that bars EPA from considering cost in its application." *Id.* at 22a.

There is nothing about this holding that remotely warrants this Court's intervention. There is no conflict between it and the other cited cases addressing EPA's authority to consider costs under Sections 109, 110, or 112. Indeed, the CAA precedents are consistent with each other. They indicate that EPA's authority to consider cost factors when implementing the CAA must be determined on a case-by-case basis through analysis of congressional intent, as revealed by the text of the statutory provision under which the agency acts and other appropriate indicia, as well as the factual circumstances of the specific consideration of costs at issue.

In reality, Petitioning States do not seek from this Court a "resolution" of the Section 109 and Section 110 precedents, but rather a modification of earlier holdings with which they disagree. *See, e.g.*, Michigan at 21 (advocating that this Court "resolve" alleged conflict by flipping the D.C. Circuit's prior holdings and deciding that EPA *must* consider costs under Section 109 but *cannot* consider them under Section 110); *see also* Ohio and Indiana at 14-15 (advocating that this Court hold that EPA *may* consider costs under both Sections 109 and 110, but only as a secondary factor to health concerns under Section 109 and to air quality concerns under Section 110).

Given Petitioning States' failure to demonstrate any conflicts between the decision below and other CAA cases addressing EPA's authority to consider costs, as well as the

lack of identity between the issues in this case and those in *ATA*, this Court should deny the request of Ohio and Indiana to defer consideration of the certiorari petitions until after resolution of the *ATA* cases. *See* Ohio and Indiana at 16 n.8, 17.

Even were this Court persuaded that there is some tension in D.C. Circuit precedents regarding EPA's authority to consider costs in implementing the CAA, it is well-settled that this Court does not sit to resolve intracircuit conflicts. The established principle, as Justice Harlan once wrote, is that "decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself." Robert L. Stern, et al., Supreme Court Practice 176 (7th ed. 1993) (quoting Hon. John M. Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 552 (1958)). The *en banc* process is the established means of identifying and settling any intracircuit conflicts.

Petitioning States also attempt to argue that, because EPA actions under the CAA that have nationwide scope can only be reviewed by the D.C. Circuit, conflicts among D.C. Circuit CAA decisions are "on par" with conflicts between different circuits. Michigan at 19. They offer no support for this theory, which is inconsistent with the very reason the CAA provides nationwide jurisdiction in the D.C. Circuit in the first place.

II. THE DECISION BELOW CORRECTLY AFFIRMED EPA'S DISCRETION TO CONSIDER COST FACTORS IN THE DETERMINATION OF SIGNIFICANT CONTRIBUTION

The issue before the D.C. Circuit was not whether EPA's consideration of a cost factor under Section 110(a)(2)(D) is the correct way to determine significant contribution, but

whether it is a permissible one. Neither the CAA nor its legislative history detail how Congress intended the phrase "contribute significantly" to be interpreted.[4] Thus, as established under *Chevron*'s familiar two-step framework, the question for a reviewing court is whether the agency action is based on a permissible construction of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). EPA's interpretation is reviewed with great deference and upheld if reasonable. *See, e.g., Association of Am. Railroads* v. *Surface Transp. Bd.*, 161 F.3d 58, 64 (D.C. Cir. 1998) (court engaging in *Chevron* step-two analysis affords "significant leeway" to agency interpretation); *OSG Bulk Ships, Inc.* v. *United States*, 132 F.3d 808, 814 (D.C. Cir. 1998) (court accords "great deference to the particular way in which the agency chooses to implement a statute that it is empowered to administer"). Deference to EPA's interpretation is indeed at its zenith in this case due to the highly technical nature of the significant contribution determination and the complex statute in which it is embedded. *See New York* v. *EPA*, 852 F.2d 574, 580 (D.C. Cir. 1988) (court accords great deference to decisions within agency's "area of special expertise, at the frontiers of science"), *cert. denied*, 489 U.S. 1065 (1989).

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[4] Petitioning States Michigan *et al.* argue that the "plain language" of Section 110(a)(2)(D), and the legislative history associated with it, make clear that "[t]he word 'significantly' goes to the level of the impact and cannot reasonably be interpreted to allow the consideration of economic efficiency." Michigan at 13. As they note, the 1990 Amendments changed the transport prohibition from a prohibition on interstate pollution that "prevent[ed] attainment" downwind to the current significant contribution standard. While Petitioning States see this change as indicating that the word significantly goes to the level of impact, it is just as plausible that the amendment from "prevent" to "significantly contribute" reflects congressional awareness that it is difficult, if not impossible, from an air-quality perspective alone to quantify the role of particular upwind states in determining downwind attainment.

The record in this case more than substantiates the Court of Appeals' judgment that EPA's consideration of costs in implementing the transport prohibition was permissible and reasonable. As detailed above, the court concluded, based on well-established precedent, that nothing in the CAA precludes EPA from considering cost when making a remedial determination under its authority to issue SIP Calls. Further, the D.C. Circuit recognized that EPA exercised its discretion to consider costs under Section 110(a)(2)(D) in an appropriate manner. Indeed, the court stated that "[i]n some contexts, 'significant' begs a consideration of costs," Michigan App. at 19a, and detailed at length its reasons for concluding that the determination of significant contribution under Section 110(a)(2)(D) was a circumstance that warranted consideration of costs, *see id.* at 19a-22a.

Petitioning States assert that EPA's determination of significant contribution relied on an "arbitrary, unbounded" standard. *See* Ohio and Indiana at 9-12; *see also* Michigan at 23 n.13. Petitioning States are wrong. As the Court of Appeals recognized, EPA's consideration of cost in its significant contribution determination was a reasonable decision, given the complexities of ozone transport, to design a solution based on determining whether downwind attainment problems could be addressed by eliminating at least the amounts of NOx emissions that could be most cost-effectively eliminated. *See* Michigan App. at 14a-15a. Moreover, EPA's air quality evaluation of the cost methodology included modeling and comparative analysis of the downwind impacts of the cost-effective state NOx budgets as well as of more stringent control measures. *See* 63 Fed. Reg. at 57412-13. Thus, EPA's use of a cost factor was neither arbitrary nor unbounded but rather reflected a complex, reasoned approach to identifying and addressing significant contribution.

Moreover, the agency's decision to consider cost-effectiveness in devising a remedy for states' violations of Section 110(a)(2)(D) is consistent with basic principles of ozone nonattainment planning. As reflected in twenty years' worth of congressional guidance, Congress and EPA have consistently concluded that in the absence of complete knowledge on the sources and receptors of ozone transport, it is reasonable to assign a level of emissions control to states based on the technical and economic feasibility of available controls.[5] Accordingly, as the Court of Appeals properly recognized, Michigan App. at 18a-20a, it was entirely appropriate for EPA to take such factors into account, in conjunction with air quality factors, to calculate the emission reductions necessary for states to comply with Section 110's transport prohibition.

Indeed, EPA's use of a cost factor in the NOx SIP Call is consistent with the views expressed by Petitioning States regarding when consideration of cost is appropriate under Section 110. *See, e.g.*, Ohio and Indiana at 15 (stating that cost consideration is appropriate under Section 110 when the consideration of cost is secondary to air quality factors) and Michigan at 21 (stating that cost considerations are appropri-

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[5] The central concepts guiding federal and state ozone attainment efforts over the past two decades have been requirements related to "reasonably available control measures" (RACM) and "reasonably available control technology" (RACT). *See, e.g.*, 42 U.S.C. § 7511(b)(2)(A) (requiring ozone nonattainment areas to be reclassified to follow through on requirements in § 7511a to implement RACT measures); *id.* § 7511c (requiring states in Northeast Ozone Transport Region to implement RACT). And for more than two decades, EPA policy and guidance have interpreted RACM and RACT requirements to call for the implementation of controls that are technologically and *economically* feasible. *See, e.g.*, 45 Fed. Reg. 59,331 (Sept. 9, 1980) (defining RACT as "the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility").

ate under Section 110 when they are "relevant to [the] decision and indispensable in providing a reasoned basis for the agency's action").

Thus, Petitioning States have not established any grounds warranting this Court's review of EPA's consideration of cost in determining significant contribution under Section 110(a)(2)(D).

III. EPA'S SIGNIFICANT CONTRIBUTION DETERMINATION DOES NOT VIOLATE FEDERALISM OR INTERSTATE EQUITY CONCERNS

Petitioning States Ohio and Indiana argue that EPA's approach in the NOx SIP Call is not consistent with the "federalism-sensitive" approach of the CAA because it improperly ignores the significance of state boundaries and does not base emission reduction obligations upon an assessment of each state's proportionate contribution to downwind attainment problems. Ohio and Indiana at 9-16. They also contend that the decision below deserves review because, like other state border disputes involving natural resources, this case involves an important national problem and the States are opposed to one another concerning the allocation of responsibility for solving this problem. *Id.* at 16-17. These arguments merely rephrase complaints that have already been considered and rejected in the decision below. *See* Michigan App. at 11a-13a, 22a-23a and 33a-37a (holding that EPA conducted sufficient state-specific analyses of significant contribution, that EPA's use of regional uniform controls to calculate the states' NOx budgets was reasonable, and that EPA's specification of NOx budgets did not violate states' rights under the CAA to make implementation decisions).

A. EPA's Significant Contribution Determination Does Not Ignore the Significance of States' Boundaries in Determining their Reduction Obligations.

Ohio and Indiana argue that EPA's significant contribution determination violates the "cooperative federalism" scheme of the CAA by ignoring the significance of state boundaries. Ohio and Indiana at 8. As Michigan, et al. describe, the CAA assigns EPA the responsibility to promulgate air quality standards and to determine whether states are meeting all applicable CAA requirements, while assigning to states the responsibility to design SIPs to achieve the federally-established CAA requirements. Michigan at 4. This scheme includes deference to state authority on intrastate issues and deference to federal authority on issues of interstate concern. *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91, 103-108 (1972) (recognizing necessity of federal common law remedy for interstate water pollution where no federal statutory remedy exists). EPA's SIP Call is entirely consistent with this statutory federalism scheme. In the SIP Call, EPA properly met its statutorily-defined federal role under the CAA to determine which states were failing to meet their transport obligations under Section 110(a)(2)(D), and to require those states to revise their SIPs accordingly.

Moreover, contrary to the assertion that EPA's approach ignored the significance of state boundaries, EPA's approach respects the significance of state boundaries in several ways. First, as the Court of Appeals recognized, *see* Michigan App. at 33a-37a, in calculating a remedial strategy to address transport, EPA appropriately determined only the necessary emissions reductions and left to the states to determine for themselves the best implementation strategies, as required by *Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir.), *modified on other grounds*, 116 F.3d 499 (D.C. Cir. 1997). Second, EPA used inventories of NOx emissions from covered states to determine, applying its cost-effectiveness methodology, the

amounts of NOx emissions that each state could emit consistent with Section 110's prohibition on significant contribution. And third, as the D.C. Circuit recognized, *see* Michigan App. at 11a-13a, EPA conducted state-specific air quality modeling sufficient to confirm that the proposed state NOx budgets would satisfactorily address the prohibited regional transport.

Petitioning States also misleadingly imply that EPA's $2,000 per ton cost-effectiveness standard improperly affects states' implementation decisions about how to achieve the NOx emissions budgets derived from the standard, and that EPA's use of the cost factor resulted in EPA promulgating less stringent budgets than necessary for some states. *See* Ohio and Indiana at 13-14; Michigan at 22-25. To the contrary, EPA's significant contribution determination did not excuse any states from achieving the reductions EPA determined were necessary to address downwind impacts, nor does the cost factor EPA used in that determination play any role at all in state's implementation decisions. The states' obligations under the SIP Call are not to impose cost-effective controls, but rather to limit sources within their borders to the specific amounts of NOx emissions EPA determined, using the cost-effectiveness methodology, that each state could emit consistent with Section 110(a)(2)(D). As the Court of Appeals affirmed, Michigan App. at 33a-37a, the SIP Call appropriately leaves states free to achieve the mandated emissions levels in any manner they choose, including through expensive, technology-forcing mechanisms, if they desire. *See id.* at 37a. [6]

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[6] EPA's rule pointed out that certain controls—namely, controls on coal-fired electric generators and large industrial sources—would be the most cost-effective means of meeting the established budgets, but the agency made clear that states could employ any emissions control measure they chose to bring their emissions within the NOx budget requirements. *See* 63 Fed. Reg. at 57,400.

Thus, EPA's significant contribution determination is appropriately sensitive to federalism concerns. It does not ignore the significance of states' boundaries, nor does it interfere with states' implementation rights with regard to ozone transport.

B. The Federalism Structure of the CAA Does Not Require EPA to Adopt a Proportional Interpretation of States' Emission Reduction Obligations under Section 110(a)(2)(D).

Ohio and Indiana urge this Court to find with respect to interstate transport that the federalist scheme of the CAA requires that each State "contribute to the solution in proportion to its contribution to the problem," Ohio and Indiana at 14. They do not explain, however, why the cooperative federalism structure of the CAA requires that the term "significantly" in Section 110(a)(2)(D) must be interpreted in proportionate terms. Mathematical proportionality is but one possible interpretation of the "significant contribution" standard and, as detailed above, it is not the interpretation that EPA, in its discretion, found to be the most reasonable in the context of ozone transport.

Petitioning States support their arguments by detailing some apparently anomalous or nonproportional results of EPA's significant contribution determination that they allege violate federalism and state sovereignty principles. *See* Ohio and Indiana at 12-13; Michigan at 22-24. For example, Ohio and Indiana complain that "a relatively large contribution of ozone [from Pennsylvania to New York] is considered insignificant under EPA's standard while a nominal contribution of ozone [from Indiana to New York] is considered significant."[7] Ohio and Indiana at 13; *see also* Michigan at

[7] Ohio and Indiana do acknowledge that "[o]f course, Indiana has an effect on other downwind nonattainment areas besides New York," Ohio and Indiana at 13 n.6, but still assert that somehow Indiana's emission reduction obligations should be based on the "actual amounts" contributed to ozone problems elsewhere. What

24-25 (complaining that such outcomes illegitimately require states to do both more and less than Congress intended them to do to address interstate transport).

The Court of Appeals properly rejected similar complaints below when it determined that EPA's state-specific modeling was sufficient to support the rationality of the NOx SIP Call, *see* Michigan App. at 11a-13a, and that EPA's use of regionally uniform controls to establish the budgets was reasonable, *see id.* at 22a-23a. The isolated examples of nonproportional outcomes raised by Petitioning States do not warrant this Court's review of the lower court's findings. The examples are based on modeling of unidimensional, static and partial outcomes of the SIP Call (that is, impacts from one state to one other state) when in reality ozone transport is multidimensional and dynamic (that is, each state impacts and is impacted by multiple other states in a constantly changing scenario).

In the real world, the "significance" of an upwind state's NOx emissions on downwind ozone nonattainment is a function not only of air movements, weather, and chemical transformations that vary endlessly over time, but also of the actions of all the other upwind sources in other states, as well as federal, state and local air pollution laws and other factors. In these circumstances, as the court below found, EPA's functional interpretation of the term "significantly" reasonably implements the CAA's transport prohibition, particularly as EPA's interpretation is also appropriately sensitive to states' rights and interstate equities under the CAA.

Ohio and Indiana fail to acknowledge, however, is that determining "the" "actual" amounts that Indiana will contribute to downwind problems in other states is in some sense a conceptual conundrum, as those amounts will vary at different times not only with different weather patterns but also with variations in the emission amounts coming from other states.

C. EPA's Significant Contribution Determination Does Not Raise Interstate Equity Issues Requiring this Court's Review.

Ohio and Indiana argue that this case is similar to the disputes among States concerning borders and natural resources over which this Court has exercised original jurisdiction, *see* Ohio and Indiana at 17. To the contrary, this case is nothing like those cases, which typically have arisen under common and state law. The current case arises under one of the most detailed and comprehensive federal regulatory statutes, a statute in which Congress expressly answered the difficult question of how the burdens of interstate transport should be addressed. Section 110(a)(2)(D) of the CAA clearly indicates that states must control their sources to prevent significant contribution to downwind attainment difficulties. Given this unequivocal congressional directive, and the fact that the Court below correctly upheld the agency's approach to implementing it, there is no need for further review by this Court of the reasonableness of the agency's approach.

Moreover, contrary to the view of Petitioning States Ohio and Indiana, the fact that States are lined up against one another with regard to the NOx SIP Call does not indicate a flawed rule mandating review by this Court. Rather, it reflects the difficulty of devising a rule to address interstate responsibility for ozone transport that can please every state. Indeed, as Michigan et al. acknowledge, the inability or unwillingness of states to meet their obligations to eliminate downwind pollution contributions is an important reason that Congress revised the CAA in 1990 to strengthen the statutory provisions addressing interstate transport, including Section 110(a)(2)(D). *See* Michigan at 13. Thus, in this case, EPA has simply performed its congressionally-delegated federal role of determining how states must meet their transport obligations, a role made all the more important since the states' interests are diverse from each other.

In addition to addressing the interstate transport problem, however, EPA's approach in the NOx SIP Call also serves to rectify an existing inequity among states' air pollution control schemes that has resulted from the impacts of ozone transport. For decades, sources in the South and Midwest—areas generally in attainment with the national ambient air quality ozone standards—have been able to emit vast amounts of NOx emissions that travel downwind to North-east and Mid-Atlantic states not in attainment with ozone air quality standards. These downwind states suffer not only adverse health and environmental effects from the pollution transported into the region, but also have been required to impose increasingly stringent and costly control measures on sources within their borders as they try to reach ozone attainment. In particular, electric generating companies in downwind states have been forced to install expensive emission control equipment to address not only their local emissions but also those transported from upwind regions.

By requiring states to comply with Section 110(a)(2)(D) 's transport prohibition, the SIP Call brings upwind states to account for the NOx emissions their sources send downwind, and does so while recognizing the economic constraints on upwind states' ability to implement emission controls. Thus, the SIP Call promotes both cleaner air and a more equitable allocation of the regional pollution reduction burden, as EPA has recognized, *see* 63 Fed. Reg. at 57,404.

In short, EPA's determination of significant contribution is appropriately sensitive to issues of federalism and interstate equity and does not warrant attention from this Court. Congress has required states to prevent significant contribution to downwind attainment problems and delegated to EPA the duty to ensure that states comply. As the D.C. Circuit held, EPA's significant contribution determination properly took into account state-specific factors and does not improperly deny states their congressionally-assigned implementa-

tion role in the CAA statutory scheme. While Petitioning States may disagree with this result, they have identified no compelling reason for this Court to devote its scarce resources to an exercise in purported error-correction.

CONCLUSION

For the foregoing reasons, the petitions should be denied.

Respectfully submitted,

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